

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 2000 Session

JIMMY ROGERS vs. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. P-17811 John P. Colton, Jr., Judge**

No. W1999-1453-CCA-R3-PC - Decided August 22, 2000

The Defendant, Jimmy Rogers, appeals as of right from the trial court's denial of post-conviction relief after an evidentiary hearing. On appeal, he argues that the trial court erred by finding that he received effective assistance of counsel at the trial level and by finding that his guilty pleas were voluntarily and knowingly made. We find no error. Accordingly, we affirm the judgment of the trial court denying the Defendant's petition for post-conviction relief.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN, J., and CORNELIA A. CLARK, SP. J., joined.

Robert B. Gaia, Memphis, Tennessee, for the appellant, Jimmy Rogers.

Paul G. Summers, Attorney General and Reporter; Kim R. Helper, Assistant Attorney General; William Gibbons, District Attorney General; Perry Hayes, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant, Jimmy Rogers, was indicted for first degree murder, attempted especially aggravated robbery, attempted aggravated robbery, and four counts of aggravated robbery. Pursuant to a negotiated plea agreement, the Defendant pleaded guilty on September 30, 1996 to the lesser included offense of second degree murder, for which he received a twenty-five year sentence; the offense of attempted especially aggravated robbery, for which he received an eight year sentence; the offense of attempted aggravated robbery, for which he received a three year sentence; and four counts of the offense of aggravated robbery, for which he received an eight year sentence for each count. All sentences were to be served concurrently.

Subsequently, the Defendant filed a petition for post-conviction relief alleging, among other things, that his counsel was ineffective for not requesting a mental evaluation prior to allowing the Defendant to enter the guilty pleas. He also alleged that his pleas were not knowingly and

voluntarily entered because his counsel told him that he would be eligible for parole after serving thirty percent of his twenty-five year sentence for second degree murder, rather than one hundred percent of that sentence. After an evidentiary hearing, the trial court found that the Defendant's trial counsel was effective and that the pleas were voluntarily and knowingly entered; therefore, it denied relief. We agree with the findings of the trial court and affirm its judgment.

The Defendant first argues that he should be granted post-conviction relief because his trial counsel was ineffective. Relief under our Post-Conviction Procedure Act will be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by either the Tennessee Constitution or the United States Constitution. Tenn. Code Ann. § 40-30-203. In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the Sixth Amendment right to counsel was "so fundamental and essential to a fair trial . . . that it is made obligatory upon the States by the Fourteenth Amendment." Id. at 340 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)). This right to counsel includes the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).

To determine whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To succeed on a claim that counsel was ineffective at trial, a petitioner bears the burden of showing that his or her counsel made errors so serious that he or she was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner, resulting in a failure to produce a reliable result. Strickland, 466 U.S. at 687; Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong, the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice requirement is modified so that the petitioner "must show that there is a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

When reviewing trial counsel's actions, this Court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

If afforded a post-conviction evidentiary hearing by the trial court, a petitioner must do more than merely present evidence tending to show incompetent representation and prejudice; he or she must prove factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f).

When an evidentiary hearing is held, findings of fact made by that court are conclusive and binding on this Court unless the evidence preponderates against them. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Cooper, 849 S.W.2d at 746 (citing Butler, 789 S.W.2d at 899).

The Defendant argues that his trial counsel was ineffective for failing to request a mental evaluation for him because counsel knew that he received a stab wound to his head immediately prior to the events giving rise to the indictments and because counsel knew he had previously received mental health treatment. Medical records introduced at the evidentiary hearing showed that the Defendant did receive a wound to the head on the day before the murder. He was treated with stitches and pain medication and released the same day, after being told to return in seven days to have the stitches removed. The medical records showed that the Defendant did not have a concussion. John Hough, Jr., the Defendant's trial counsel, testified that he knew about the stab wound, but that it was just a "superficial" wound. Mr. Hough also testified that he knew the Defendant had been previously treated in the hospital for a suicide attempt, but that the Defendant was again treated and released; he was not treated for a mental health problem. No medical records from this incident were included in the record. Mr. Hough said that the Defendant was cognizant of what he was doing, that he seemed logical, and that "there was never any question in my mind that this injury the day before the murder would have caused any problems with him." He testified, "I didn't see any indications of any incompetency in him at all."

Based on Mr. Hough's testimony and the medical records in the file, the trial court determined that the Defendant's claims of ineffective assistance for failure to pursue a mental evaluation were without merit. As stated by Mr. Hough, there is "nothing in those [medical] records to indicate that there was anything wrong with him other than two or three sutures in his head." Without any indications that the Defendant was incompetent or suffering from mental illness, we do not see how it could have been ineffective assistance for Mr. Hough to proceed without requesting a mental evaluation. Accordingly, we conclude that the evidence does not preponderate against the trial court's finding that the Defendant's trial counsel was not deficient in the performance of his duties.

The Defendant next argues that his guilty pleas were not voluntarily and knowingly entered because he believed that he would be eligible for parole after serving thirty percent of his twenty-five year sentence, rather than one hundred percent. The United States Supreme Court has said that, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See Brady v. United States, 397 U.S. 742, 747 n.4 (1970); Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court stated, "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Id. at 31. In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court ruled that defendants should be advised of certain constitutional rights before entering guilty pleas, including the privilege against self-incrimination, the right to confront witnesses, and the right to a trial by jury. Id. at 243. If the proof establishes that the accused was aware of his or her constitutional rights, he or she is entitled to no relief. Johnson v. State, 834 S.W.2d 922, 926 (Tenn. 1992). In determining whether a plea of guilty was voluntarily,

understandingly, and intelligently entered, the court must consider all of the relevant circumstances that existed at the entry of the plea. State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995).

At the evidentiary hearing, the Defendant testified that his counsel told him that the State was offering a plea bargain for twenty-five years for a plea to second degree murder, and he would only have to serve thirty percent of that sentence before being eligible for parole. He admitted that the trial judge told him during the plea hearing that it was twenty-five years at one hundred percent, but he said that he "thought [he] had a deal" for thirty percent. The transcript from the hearing reveals that the trial judge went into great detail explaining the Defendant's rights to him and the consequences of entering a guilty plea. The Defendant indicated that he understand all of those rights and consequences. The trial court explicitly stated, "[Y]ou will be required to serve the 25-year one hundred percent sentence upon your plea of guilty to the Class A offense of murder in the second degree and all of the rest of the time will be included in that particular sentence. Now, is that your understanding, sir, of what your plea arrangement is with the State?", to which the Defendant replied, "Yes, sir." After questioning the Defendant about his satisfaction with his attorney's representation, the trial judge again asked the Defendant, "Now, you do understand that as to the Class A felony of murder in the second degree as a violent offender, you will have to serve one hundred percent of your sentence? Do you understand that, sir?" The Defendant again responded, "Yes, sir." At this point Mr. Hough indicated that he had told the Defendant that he could reduce the sentence by fifteen percent for "good and honor credit," which would mean the Defendant would have to serve at least twenty-one and a quarter years of the sentence, and the Defendant indicated that he understood that as well. Mr. Hough testified at the hearing that he did tell the Defendant at one point that he would be eligible for parole after serving thirty percent of a twenty-five year sentence for second degree murder, but he said he later realized his error and informed the Defendant that it would be one hundred percent with possible reduction for good behavior. He said that he thoroughly went over the plea agreement with the Defendant and that the Defendant knew what he was doing. He said the Defendant was happy with the plea agreement because the Defendant was no longer facing the death penalty or life in prison and because he was able to serve his sentences for six other crimes at the same time.

The trial court found that the Defendant was informed of and was aware of his constitutional rights and that the guilty pleas were entered knowingly and voluntarily. We agree. The Defendant never gave any indication during the plea hearing that he did not understand his pleas. When asked repeatedly, he said that he understood. Mr. Hough testified that he explained the plea agreement and that the Defendant knew what he was doing. The Defendant admitted that the trial court told him he would have to serve one hundred percent of his sentence for second degree murder. The evidence simply does not preponderate against the trial court's finding that the pleas were knowing and voluntary.

The judgment of the trial court denying the Defendant's petition for post-conviction relief is affirmed.

DAVID H. WELLES, JUDGE